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ABSTRACT

This paper presents an overview of copyright issues for research and teaching. The first section provides historical background from the origin of the concept of copyright in 1557 in Britain to the present. The second section looks at fair use, including parameters and guidelines for reproduction. The following sections discusses the Berne Convention, the WIPO (World Intellectual Property Organization) Copyright Treaty Act, the DMCA (Digital Millennium Copyright Act), the TEACH (Technology, Education, and Copyright Harmonization) Act, and the Sonny Bono Copyright Term Extension Act of 1998. The final section addresses public domain. (Contains 22 references.) (MES)

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# The Wrinkle in your Research and Teaching: Copyright, DMCA, Guidelines, and Public Domain

By: Suann Alexander & Diane Baird

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**Eighth Annual**
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**The Challenge Continues**
**March 30-April 1, 2003**

# 2003 Conference Proceedings

# The Wrinkle in Your Research and Teaching: Copyright, DMCA, Guidelines, and Public Domain

By: Suann Alexander, Diane Baird
Track 4 - Policies, Standards, and Issues
Interest: General :: Lecture/Presentation :: Level: Beginner

## Abstract

Iron out the wrinkle created by copyright! Information about recent copyright legislation will equip you to iron out those wrinkles that can affect your academic work. Copyright is constantly changing in scope and concept. Legal expertise is often the ultimate answer. But a basic understanding of the historical background, constitutional basis, some of the accepted guidelines, current legislation, and the public domain advocacy issue will help to avoid any problem wrinkles that copyright might create in your research and teaching.

## Proceeding

Think about it. Everything is going smoothly with your research paper, web page design, or class preparation, when up pop the copyright questions. Can I use this quote or this material without breaking copyright law? How much of this material can I legitimately photocopy for my class or put on Reserve? Can I use the material from this web page, or put this music on my web page? How does copyright protect the material I have created? Copyright can certainly put a wrinkle in the research, writing, and class planning process that was going along so smoothly. And new laws and guidelines are coming so fast that you cannot keep up with all the new wrinkles that those copyright laws create. You will either have to learn to deal with copyright before it messes up your nicely ironed research paper, or you will have to learn to iron faster. Here is some information that will hopefully help with all those wrinkles and make your research, writing, and teaching a much smoother process.

**A Little History**

Copyright is not a modern institution. The concept of copyright began in Britain in 1557 to protect intellectual property and was considered important enough to be included in the Constitution of the United States of America. The primary purpose of copyright, according to the framers of the constitution, is to "promote the progress of science and the useful arts" (Article 1, Section 8) by giving authors exclusive rights to their writings for a reasonable time. It prevents persons other than the author from profiting from the work.

Enacted in 1790, the first United States Copyright Act was a close replica of an earlier English statute.

This act has had numerous revisions, including the major revision act of 1976. The 1976 act has been amended more than 30 times with many more changes expected. Because of changes in law, science, technology, and international relations it is necessary to amend the copyright law to protect works not previously covered and to comply with international treaties. Since 1989, we have experienced at least four major acts concerning intellectual property – the Berne Convention, the Copyright Term Extension Act (Sonny Bono Act), the Digital Millennium Copyright Act (DMCA), and the Technology, Education and Copyright Harmonization Act (TEACH). Most changes were a gradual effort to truly protect intellectual property. However, it does not appear that these answer the needs, so we can expect more changes in the near future. All these factors have radically changed the concept of intellectual property, creative efforts, fair use, copyright, and public domain.

**Fair Use**

The Federal Convention of the United States established copyright protection in the final draft of the United States Constitution "To promote the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." Fourteen years was the time limit set in 1790 and the limit has now been stretched to the author's life plus 70 years. The Copyright Act of 1976 is the last comprehensive copyright act passed by Congress and is still in effect because it included inclusive language that would not limit format or technology. This act is one academia has dealt with successfully because of the important accompanying Fair Use doctrine or privilege (Section 107). The 1976 act truly implemented the Constitutional goal of promoting progress of useful information by allowing exceptions for educational purposes even when faced with extension of exclusive rights. The Founding Fathers realized the importance of utilizing information as a foundation for growth and expansion of creativity and science for the benefit of all. The Fair Use privilege is unique because it allows exception to copyright exclusiveness and recourse for copyright holders and even punishment for copyright infringement. It does not define fair use in a quantitative aspect; any infringement must be decided through legal action on a case-by-case basis. Reproduction of copyright material considered fair would be for criticism, comment, news reporting, teaching, scholarship, and research. Reproduction is set within parameters outlined by four factors in Section 107 of Title 17, U.S. Code:

1. the purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work
3. amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

These factors have been utilized, quoted, promoted, reviled, and bowed to since 1976 and many have become inured of their importance. These factors are the essence of using copyright material in academia. They must be protected, utilized, adhered to, and championed by academia. Copyright protects the creative expression of the copyright holder; it does not protect the ideas, systems, or factual information conveyed or contained in the work. That is the basis of fair use; allowing enough reproduction to present the idea, system, or facts available without compromising the creativity of presentation. The Fair Use Act or Doctrine of Fair Use should not need to be explained – FAIR is the operative word.

However there are many myths surrounding fair use. One of these is that as long as it is for educational purposes and you cite it, you can use as much of someone else's work as is needed. Remember, this is a myth. Since the Fair Use Act is qualitative and not quantitative it only perpetuates these myths. Because there is much confusion about what can and cannot be reproduced many associations have agreed on guidelines to help ease the way for fair use of copyrighted material. Many of these are available on-line for educational purposes from kindergarten to space. In general, reproduction of copyright material should be based on:

1. Text: up to 10 percent or 1,000 words of a copyrighted text may be used, an entire poem may be

used if it's less than 250 words; for longer poems, a limit of 250 words may be used, a chapter of a book or one article in a journal could be use.

2. Music and lyrics: Up to 10 percent of a copyrighted composition may be reproduced, but should be limited to 30 seconds of an individual composition.
3. Visual images: A photograph or illustration may be used in its entirety but no more than five images by an individual artist or photographer. Up to 10 percent or a limit of 15 images of a collective work may be copied.
4. Films and videos: Up to 10 percent of a copyrighted work or approximately three minutes may be reproduced.

Remember, these are guidelines or suggestions and should not be confused with legal descriptions. Guidelines are the beginning point for consideration in reproduction of copyrighted material. Fair use compliance is always necessary and citing your source is always advisable.

**The Berne Convention**

In 1886, the first major international convention on copyright was held. The result of this convention was an international treaty with standards for copyright protection. The convention members include most of the major industrialized countries of the world. However, the United States did not become a member until March of 1989 when it. became the 77th member country to join the convention. The Berne Convention protects the literary, artistic and scientific works of members of the Convention in any of the other member countries. Therefore, your creative work has the same protection in most other countries as it does here in the United States. The Convention also made written notice or registration of works first published after March 1, 1989 optional for basic copyright protection in any of the Convention member countries. From the moment you put your work in a tangible form it is protected unless it was published before the United States became a member in 1989. However, you should register your copyright for greater protection if you should ever have to bring suit. Each country must offer a minimum standard of copyright protection that includes: a time limit of the author's life plus 50 years; a provision for fair use of the copyrighted work; and the author's moral rights to his/her work. The moral rights clause protects the integrity of the copyright holder's work from change or distortion without permission and cannot be transferred to a third party.

**The WIPO Treaty**

In 1996, the United States signed the WIPO (World Intellectual Property Organization) Copyright Treaty Act that builds on the Berne Convention to include copyright protection for digital works and computer software. Under this international treaty, it would be an infringement of copyright to make unauthorized copies of material on a website or to remove or alter the copyright owner's information from a digital work. All the countries that signed the treaty are required to enact copyright laws to protect work in digital format. The United States amended its copyright law in 1998 to comply with this treaty. The result was the Digital Millennium Copyright Act (DMCA).

**Digital Millennium Copyright Act (DMCA)**

The Digital Millennium Copyright Act (DMCA) was passed by Congress on October 12, 1998. The DMCA was signed into law by President Clinton on October 28, 1998 and conformed to the World Intellectual Property Organization's efforts to provide a level playing field for countries' treatment of ownership and protection of intellectual property. The United States is a major exporter of intellectual property in various formats, print, software, music, and film. It was imperative that U.S. law protect American citizen's creative output for export as well as protecting intellectual property imported into the United States.

The issue of copyright in the digital environment is very challenging to educators and librarians alike. Technological developments force us to continuously re-examine and re-apply our understanding of intellectual property management. The DMCA is an effort to balance the rights of copyright owners and

users in the digital environment. The availability of and easy transmission of information has created an atmosphere of skepticism and assertive protection of intellectual property. The development of the DMCA spanned five years from 1993 to 1998. The DMCA is divided into five titles that address numerous aspects of digital intellectual property.

Title I, WIPO Treaties Implementation.

Title II, Online Copyright Infringement Liability Limitation.

Title III, Computer Maintenance or Repair Copyright Exemption.

Title IV, Miscellaneous Provisions

Title V, Protection Of Certain Original Designs

Title I establishes the DMCA as a globally effective protection of U.S. citizen's intellectual property. It provides legal protection against circumventing technological protection measures and tampering with copyright management information. It prohibits the circumvention of any effective technological protection measure installed to restrict access, be it password or technology. Acceptable limitation for circumvention is available for nonprofit library, archive and educational institutions. This title also includes language stating that nothing in the act affects fair use or other information user privileges. The activities of reverse engineering and encryption research are limited by stated exceptions that must be met to protect against copyright infringement. Title I places very extreme penalties for copyright infringement offenses.

Title II outlines protection for online service providers (OSP) from copyright infringement liability. The OSP is the institution, such as a library or university, providing the connections for digital online communication service. An OSP must meet certain conditions to qualify for protection. When notified of copyright infringement by copyright holders, the OSP must have in place a method of terminating service to subscribers who are repeat offenders. . The OSP is not only the conduit for data information, but also provides the copyright holder a point of complaint.

Title III allows an owner or lessee of a computer to make a copy of a software program to maintain or repair the computer. The software must be a lawfully obtained program and the copy must be destroyed after the repair or maintenance has been completed.

Title IV has several areas that impact educators and librarians. It allows for nonprofit libraries and archives to make up to three digital copies of copyright material for preservation purposes as long as they are not made available outside the archive or library. It also allows making a digital copy of a work into a new format if the original format is obsolete. Title V of the DMCA has a minimum effect on education and the academic arena, unless you are designing a boat hull, and will not be discussed in this paper.

The distance education aspect of the DMCA was woefully inadequate, by design. Congress expressed an interest in promoting distance education through legislation and included in the DMCA a directive that the Copyright Office conduct studies and report within six months of DMCA enactment. The report resulted in the Technology, Education, and Copyright Harmonization Act (TEACH) that was passed by Congress in October 2002 and was signed into law by President Bush in November 2002.

**Teach Act**

The TEACH Act is an opportunity for distance education providers because it allows accredited, nonprofit educational institutions to utilize copyright protected materials for distance education without obtaining permission or paying royalties. The act outlines the responsibilities, limitations and procedures

that must be observed for non-infringement of copyright. Distance education is a vital and growing aspect of most academic institutions and it behooves educators to understand and utilize the TEACH Act benefits for instruction in distance education. The basic concept of traditional teaching is inherent in the act, but it still provides potential for distance education to utilize needed copyright materials. Materials must be used within the context of "mediated instructional activities", the expectation being that students will access each session within a limited time period. The time period will eliminate the necessity to store or retrieve materials later during the academic term. Faculty must also limit the portion of copyrighted materials used, portions would be comparable to that used in traditional classroom instruction. The educational institution must provide restricted access to the material available in distance education courses, but may retain restricted limited copies. The Teach Act is a major improvement, but does have restrictions that faculty and educational institutions must be aware of. Educators should avail themselves of the benefits of the act and explore methods to produce a satisfactory atmosphere of learning. An imperative is the application of the law of fair use.

The TEACH Act expanded the allowed works to include the display and performance of nearly all types of works. This usage is subject to quantity limitations, reasonable and limited portions as outlined in the act or fair use. This transmission should be a mediated instructional activity supervised by the instructor and related to the teaching content and limited to students enrolled in the class. The TEACH Act does not include transmission of supplemental materials that students would be expected to utilize outside the classroom. The Act expands the locations where the information may be received; with limited access distance education students can receive classes at any location. Educational institutions have in the past been allowed to record and retain copies of distance education transmissions, this is still allowable, but the time frame is limited, and should be used only for transmission for distance education, and placed in storage unavailable to students. If copyrighted material is not available in digitized form, it may be digitized in order to facilitate transmission. The Act specifies that students should be notified that materials included in distance education transmission may be subject to copyright protection and notification should be included on distribution materials for class.

The passage of the TEACH Act is fairly recent and the true impact on distance education, fair use, and course construction is still being tested. In the coming months there will be much commentary on the act, and methods of utilizing the act, to accommodate the process of instruction within the academic arena.

**The Sonny Bono Copyright Term Extension Act of 1998**

In October of 1998, Congress enacted the Sonny Bono Copyright Term Extension Act. This act essentially added twenty years to the term of copyright for all works still under copyright at the date the act went into effect as well as for future works. The following table shows the basic duration of copyright as it stands as of this time.

**Copyright Duration Table**

| Date and Nature of Work | Copyright Term |
|---|---|
| **Published before 1923** | **In the public domain** |
| Published 1923-1963 and never renewed | In the public domain |
| Published 1923-1963 with timely renewal | 95 years from date of first publication |
| Published 1964-1977 (with © notice) | 95 years from date of first publication |
| Created 1978 or later (published or not) | Life of author plus 70 years |
| Created 1978 or later (anonymous/for hire) | 95 years from publication or 120 years from creation, whichever ends first |

This act makes it more difficult to find works that are in the public domain. There is one exception in the act that impacts libraries, archives, and nonprofit educational institutions. It allows these entities, not individuals, to treat a copyrighted work that is in its last twenty years of protection as if it is in the public

domain with certain restrictions.

1. It must be used for noncommercial or archival purposes only
2. A good faith search must determine that the work is "not subject to normal commercial exploitation." Some sources explain this as the work not being available for sale.
3. And that any use of the work would cease if the owner of the copyright provides notice to the contrary.

It is wise, anytime the boundaries of fair use are extended, to be absolutely sure that the work is in the public domain or that permission from the copyright holder is given. The penalties for copyright infringement, if brought to court, can be anywhere from $200 to $150,000 and could include prison time.

PUBLIC DOMAIN

There is at present a cadre of legislators, educators, lawyers and citizens that are questioning the correctness of several aspects of current copyright provisions. This reluctance toward the copyright arena deals with the original intent of the U.S. Constitution provision of limited exclusive rights and the concept that copyright protects the creative process, not the facts, of the copyright material and that technology may inhibit the Fair Use provision The Sonny Bono Copyright Extension Act has been scrutinized against the intent of the U.S. Constitution and the Supreme Court has upheld it. The argument is that the Extension Act could be deemed unconstitutional because it diminishes the effectiveness of public domain. As things now stand, if an author publishes at thirty and lives to sixty-five years of age the copyright on his work could be effective for more than one hundred years. Compare this to the fourteen years allowed in the first copyright law of 1790. Currently, there is apprehension that copyright has been driven by economics without regard to the benefits for society. The DMCA provision for copyright through no circumvention could inhibit the provision of fair use of copyright materials. If you cannot access material because of technological blocks you cannot invoke fair use. In light of the fact that no laws or acts have impacted the Fair Use Act this could present some interesting legal questions. Fair Use infringement is determined by legal proceedings and the language of the aggressive protection of technological materials in the DMCA is often not clear. Copyright is determined on the aspect of originality and a tangible medium, and when imposed on software the concern is on the question of fact versus originality. The concept of computer programs and databases as literary works could be questioned. The new copyright laws apply to limited areas of creative endeavor, strongly favoring fine artists, software companies, writers, movie producers and recording artists. Often, writers, recording artists and software programmers will contract with publishers or companies to produce their work and so do not totally own the rights to their creative product.

Academia is both producer and user of information and dependent on intellectual property management and policies. The current DMCA has not fully appreciated the contributions of academic research and intellectual property. Individuals supporting a better balance between proprietary rights and information access are aware of the contribution and utilization of academia. Much research on campuses begins with material that is, or at least should be, a part of public domain. How the diminishing public domain and the constriction of fair use will impact the acceptable process of research is still being questioned. Advocates of rewriting the DMCA and reversing the Extension Act can paint a very depressing scenario for the future, but any action should appreciate the need of information providers and users.

CONCLUSION

Copyright does not need to impede academic research and teaching. Copyright, ideally, is constructed to balance the interests of copyright owners with the interest of the users of copyrighted materials. The Constitution of the United States provides a basis for the concept of copyright and the advancement of science and art. Fair Use is the vehicle that allows use of copyrighted materials without infringement of the law, but does not allow unlimited and flagrant violation of Copyright Law. Technological and global interests have added an element of copyright that must be addressed for adherence to the laws of

copyright. Academic utilization of technology has enhanced research, teaching, and information delivery. This provides an exciting and creative atmosphere of challenges. Changes in copyright interpretation and laws are a challenge. The very technology that drives these changes is also the tool used to keep abreast of current trends. Access to Internet, WebPages, list serves, and e-mail are the tools to understanding your rights to use copyrighted materials for non-profit educational use. For all the current activity toward copyright protection, nothing has replaced the Copyright Law or Fair Use Act of 1976, they only complicate it.

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